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No. 90-302

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

CLARENCE E. PETEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a warrantless, suspicionless urinalysis test, performed as part of a military commander's inspection of his unit, violates the Fourth Amendment.

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OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is not yet officially reported. The opinion of the Army Court of Military Review (Pet. App. 2a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 24, 1990. The petition for a writ of certiorari was filed on August 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Rucker in Alabama. He was convicted of being absent without leave (AWOL) for four days and wrongfully using cocaine, in violation of Articles 86 and 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 886 and 912a. He was sentenced to six months' imprisonment, a bad conduct discharge, and a reduction in rank. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals summarily affirmed.

1. On February 24, 1988, petitioner and other members of his unit [1] provided urine samples at Fort Rucker for a random urinalysis test. Tr. 61, 100, 131. Petitioner's commander ordered the testing, Tr. 148, which involved taking urine samples from 340 soldiers. Tr. 141. On February 29, the samples were tested for the presence of marijuana and cocaine at the Fort Rucker Alcohol and Drug Abuse Division.

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[1] Petitioner was assigned to the Aeromedical Center at Fort Rucker. The Center is the hospital at Fort Rucker, the Army's aviation center. Petitioner performed duties as a medical supply specialist. PX 7 para. 6. As such, he was responsible for supervising the receipt, stocking and management of medical supplies (medical equipment, surgical supplies, pharmaceuticals) at the hospital. See Army Reg. 611-201, Enlisted Career Management Fields and Military Occupational Specialties, para. 2-333 (Nov. 30, 1989) (describing the duties of a medical supply specialist). In addition, petitioner was trained in the use of the M-16A1 rifle, the standard rifle of the armed forces. PX 1 para. 9. Like other soldiers, petitioner could be assigned duties involving use of the M-16A1 and other weapons.

Tr. 171-172. Petitioner's sample tested positive for the presence of the cocaine metabolite, and it was sent to the Army Forensic Toxicology Drug Laboratory at Fort Meade, Maryland, for further testing. Tr. 173; PXs 2, 3. Tests at the Fort Meade Laboratory confirmed the presence of the cocaine metabolite in petitioner's urine. PX 3. Petitioner's urine contained 16,000 nanograms(ng)/ml of cocaine metabolite—far above the 150 ng/ml cut-off level for a positive test result. *Ibid.*

2. On April 15, 1988, petitioner failed to report for duty and remained absent without authority until April 19, 1988. PXs 4, 5.

3. The Army Court of Military Review affirmed in a per curiam opinion. Pet. App. 2a. The Court of Military Appeals granted review on the question whether the seizure of petitioner's urine and the admission into evidence at trial of the urinalysis test result violated the Fourth Amendment, and summarily affirmed. Pet. App. 1a; see Supplement to the Petition for Grant of Review 1.

ARGUMENT

Citing *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), and *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), petitioner contends that the taking and testing of his urine, pursuant to the Army's drug testing program,[2] violated the Fourth Amendment. In par-

[2] The program is governed by Army Reg. 600-85, Personnel-General: Alcohol and Drug Abuse Prevention and Control Program (Dec. 1, 1981) (rev. effective Nov. 21, 1988) [hereinafter AR 600-85]. The regulation provides detailed guidance for collection and testing of urine specimens. Collection and handling of the samples is recorded on a chain of custody document, see PX 2, and only samples that are confirmed positive

ticular, petitioner argues that the Army's drug testing program is unconstitutional because the "Army uses urinalysis as a law enforcement tool and routinely uses urinalysis results as the sole basis to court-martial a soldier for wrongful drug use." Pet. 18. That claim does not warrant review by this Court.

1. Petitioner has waived any claim regarding the admission of his urine test result by failing to raise that issue at trial. Rule 311(d)(2), Mil. R. Evid., requires that an objection to the admission of evidence seized from the accused must be made prior to his submission of a plea, or else the objection is waived. Also, Mil. R. Evid. 313(b), which specifically addresses inspections, including urinalysis testing, provides that an inspection is not valid if its primary purpose is to obtain evidence "for use in a trial by court-martial or in other disciplinary proceedings." In this case, petitioner did not object to the admisison of his urine test result before entering his plea, Tr. 7-8, when the test result was offered at trial, Tr. 64, 66, 191, or at any other time. Nor did petitioner claim that the urine testing was a subterfuge for a test of his urine to be used at a court-martial or some other disciplinary proceeding.[3] Ac-

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for the presence of a drug by a Department of Defense certified laboratory using the gas chromatography/mass spectrometry test are reported as positive. See PX 3. The regulation also details the Army's drug and alcohol abuse rehabilitation program. Under the program, soldiers can refer themselves, or can be referred by their commanders, for treatment of drug or alcohol abuse. AR 600-85, chs. 3 and 4, at 15, 17. Admissions made during treatment or in order to obtain treatment may not be used as a basis for a court-martial. AR 600-85, ch. 6, § II "Limited Use Policy," at 29.

[3] Petitioner's defense at trial was that the testing procedures were flawed in that individuals may have purposely or

cordingly, petitioner has waived his Fourth Amendment claim, and specifically has waived any claim that the "inspection" was merely a pretext and that the taking and testing of his urine were actually done for criminal investigative purposes, which is the gravamen of his argument in this Court.

2. In any event, the decision below is correct. In *Skinner*, this Court upheld against a Fourth Amendment challenge regulations providing for the testing of railroad employees who violate certain safety rules. After concluding that the Fourth Amendment applied to the regulations, the Court began its analysis by noting that the principal concern of the Fourth Amendment is the reasonableness of the search or seizure. *Skinner*, 109 S. Ct. at 1414. Recognizing that ordinarily a warrant issued upon probable cause is required for a search or seizure to be reasonable, the Court noted that an exception to this rule exists when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Ibid.* In assessing whether such special needs justified the railroad regulations, the Court balanced the government's interest in testing against the privacy interests of the employees. The Court found a strong governmental interest in "regulating the conduct of railroad employees to ensure safety," *ibid.*, and noted that the purpose of the regulations was to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* at 1415 (quoting 49 C.F.R. 219.1(a) (1987)). That "compelling" interest, the Court concluded, outweighed the privacy interests of employees

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accidentally switched petitioner's sample with another sample. Tr. 345-355.

whose expectations of privacy "are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 109 S. Ct. at 1418.

In *Von Raab*, the Court reached the same conclusion regarding regulations providing for the testing of Customs Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring them to carry firearms. 109 S. Ct. at 1390. The Court held that the government had a compelling interest in ensuring that "front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment" and a similarly compelling interest in protecting the public from employees who may use deadly force. *Id.* at 1393. Those interests outweighed the privacy interests of employees who "reasonably should expect effective inquiry into their fitness and probity." *Id.* at 1394. The Court likened the privacy expectations of such employees to the expectations of "those who join our military or intelligence services [who] may not only be required to give what in other contexts might be viewed an extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions." *Id.* at 1393-1394.

The analysis in *Skinner* and *Von Rabb* makes it clear that the Army's drug testing program does not violate the Fourth Amendment. The program promotes the government's and public's compelling interest in ensuring that soldiers are fit to perform their mission "to fight or be ready to fight wars should the occasion arise." *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). As the Court of Military Appeals has recognized in many cases, the unlawful use of drugs

by servicemembers poses unique and serious problems in the military. For example, in *United States* v. *Trottier*, 9 M.J. 337, 346 (C.M.A. 1980), the court stated that "[t]he need is overwhelming to be prepared to field at a moment's notice a fighting force of finely tuned, physically and mentally fit men and women—and satisfaction of that need is not compatible with indiscriminate use of debilitating drugs." In *United States* v. *Bickel*, 30 M.J. 277, 282-283 (C.M.A. 1990), the court upheld the Army's drug testing program in light of *Skinner* and *Von Raab*, and stated that:

> [S]ervicemembers who are under the influence of drugs often have the potential to do great harm to the military mission and to national security—as well as to other persons and their property. Admittedly, a pilot or a tank operator usually will have a greater potential for harm than a servicemember assigned to a desk job. However, even a servicemember performing far away from active military operations may be operating a computer which processes information vital for those operations. Moreover, in the event of an emergency, a servicemember with a very routine job may be called on short notice to perform a more typically "military" task; and his failure to be physically and mentally ready to perform that task may jeopardize national security at the hands of foreign enemies or terrorists.

Congress has expressed its concern about the dangers resulting from the use of controlled substances by servicemembers. In Article 112a of the UCMJ Congress has forbidden the use of controlled substances by military personnel, even though the "use" of drugs is not proscribed by the general federal law

governing the possession and distribution of controlled substances. In 1971, Congress directed the Service Secretaries to establish procedures to identify, treat, and rehabilitate drug and alcohol dependent persons in the Armed Forces. 10 U.S.C. 1090. Most recently, Congress reaffirmed its mandate that recruits be tested for drug and alcohol use and that those who test positive be processed for separation. 10 U.S.C. 978. This legislative judgment reflects appropriate concern about the adverse effect that drug use by servicemembers poses to the "security, military fitness, or good order and discipline of the unit." Mil. R. Evid. 313(b).[4]

The Army's drug testing program, which allows random unannounced urinalysis testing of soldiers,

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[4] As this Court noted in *Schlesinger* v. *Councilman*, 420 U.S. 738, 760 n.34 (1975):

> The seriousness of the problem is indicated by information presented before congressional committees to the effect that some 86,000 servicemen underwent some type of rehabilitation for drug abuse in fiscal years 1972 and 1973, and only 52% of these were able to return to duty after rehabilitation. * * * It is not surprising, in view of the nature and magnitude of the problem, that in *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969), the Court of Military Appeals found that "use of marihuana and narcotics by military persons on or off a military base has special military significance" in light of the "disastrous effects" of these substances " 'on the health, morale and fitness for duty of persons in the armed forces.' "

More recent statistics show that drug abuse in the armed services has diminished significantly. See *Unger* v. *Ziemniak*, 27 M.J. 349, 357 n.16 (C.M.A. 1989) (noting a 90% reduction in drug use since 1982 and commenting that "though drug testing undoubtedly does not deserve sole credit for this improvement, we are convinced that it performed a significant role").

serves the government's vital interest in combating the "substantial threat [that drug abuse poses] to the readiness and efficiency of our military forces." *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975). It gives the commander vital information regarding the fitness of his unit. The need for such information is precisely the sort of "special need[] beyond the normal need for law enforcement" that justified the drug testing programs at issue in *Skinner* and *Von Raab*. See *Skinner*, 109 S. Ct. at 1414. Drug testing has consistently been upheld on that ground. See *Committee for GI Rights* v. *Callaway*, *supra*; *United States* v. *Bickel*, *supra*; *Unger* v. *Ziemniak*, 27 M.J. 349 (C.M.A. 1989); *Murray* v. *Haldeman*, 16 M.J. 74 (C.M.A. 1983).

Contrary to petitioner's contention, Pet. 10-12, the Army's special need for a drug testing program is not suspect on the ground that "the Army routinely uses its unit urinalysis inspections to ferret out and prosecute drug abusers." Pet. 11. In the first place, test results are not routinely or frequently used in criminal prosecutions. It is quite rare for a soldier to be criminally prosecuted following a positive test result. In the first three quarters of 1989, for example, the Army tested 718,845 urine samples as part of its drug testing program, and 16,407 samples tested positive for marijuana, cocaine, amphetamines, or other controlled substances.[5] During the same period, by petitioner's count, 70 drug-use court-martial cases "were based solely on a random unit urinalysis." Pet. 5 n.2. Thus, petitioner's contention is based on a premise that is not true.

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[5] These statistics were provided by the United States Army Drug and Alcohol Operations Agency, the agency responsible for inspecting and supervising the Army drug testing program.

That random urinalysis test results are sometimes used in criminal prosecutions does not call into question the administrative purpose of the Army's program. The concern in a situation where test results are used in criminal prosecutions, as this Court stated in *Skinner*, is that an administrative testing program is a pretext for a criminal investigative search. 109 S. Ct. at 1415 n.5. As noted, that possibility is specifically mentioned in Mil. R. Evid. 313, the Rule that addresses the admissibility of random urinalysis test results. Servicemembers can claim that their test was a pretext, and military courts have not hesitated so to find in appropriate situations.[6] Petitioner's failure to assert such a claim at his trial is dispositive of his argument in this Court.[7]

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[6] See, *e.g.*, *United States* v. *Thatcher*, 28 M.J. 20 (C.M.A. 1989) (invalidating a room inspection on the basis that the inspection was a subterfuge for a search of a suspected thief's belongings); *United States* v. *Austin*, 21 M.J. 592 (A.C.M.R. 1985) (upholding the trial judge's determination that a random urinalysis was a subterfuge for a search of a soldier's urine). Significantly, once an accused makes a prima facie showing of subterfuge, the prosecution must establish by clear and convincing evidence that the search was a valid inspection. Mil. R. Evid. 313(b).

[7] To the extent that petitioner's argument is directed at the drug testing program generally, the aforementioned statistics rebut his claim that the program is aimed at acquiring evidence for use at courts-martial. In addressing a similar argument in *Bickel*, the Court of Military Appeals appropriately stated: "We might take a different view [of the constitutionality of the Army's drug testing program] if the drug testing were designed solely to obtain evidence for criminal prosecution; but, as we understand the military drug-testing program, that is not the case. A positive drug test may result in admonitions or adverse administrative action for a servicemember—rather than in criminal prosecution." *Bickel*, 30 M.J. at 285.

Petitioner grudgingly acknowledges, Pet. 18, 15, that the Army has an interest in combatting drug abuse by soldiers. He contends, however, that this interest does not outweigh the privacy interests of soldiers who, as part of the drug testing program, are required to provide urine samples under direct observation and without notice and who "as a routine part of the program [are] not given the opportunity to question a positive [test] result." Pet. 13.

Petitioner greatly overstates the privacy interests of soldiers. Regarding the privacy interest, though petitioner may find it "most demeaning and undignified," Pet. 18, to urinate in the presence of another soldier,[8] that requirement of the drug testing program is virtually no different from other routine and necessary invasions of the privacy of soldiers. Soldiers routinely are required to use communal showers. Their barracks rooms are subject to unannounced, thorough inspections. See *United States* v. *Middleton*, 10 M.J. 123, 127 (C.M.A. 1981) (noting that such inspections are "time-honored and go back to the earliest days of the organized militia"). Soldiers are required to undergo regular physical examinations. See 10 U.S.C. 1004; Army Reg. 40-501, Standards of Medical Fitness, para. 8-21c(7) (July 1, 1987). Thus, the daily lives of soldiers lack the incidents of privacy that are available to civilians, and soldiers are subject to discipline and direction

[8] AR 600-85 provides that "[s]oldiers must be directly observed when providing urine specimens * * *; however, they will be accorded maximum respect and concern for human dignity," and directs commanders to select observers who "possess sufficient maturity and integrity to ensure that urine specimens they observe being provided are not contaminated or altered in any way." AR 600-85 paras. 10-3a and 10-4e(2), at 41, 42.

from superior officers that "would be unacceptable in a civilian setting." *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983). In short, a soldier's life is subject to pervasive regulation, and although a civilian might find it demeaning to urinate in the presence of another, for the soldier this requirement is an insignificant intrusion. When balanced against the government's interest in a reliable drug testing program aimed at ensuring that soldiers are physically and mentally fit to perform their duties, this "invasion of privacy" is minimal.

Petitioner's objection that the random urinalysis tests are unannounced is beside the point. Regardless of whether the test is announced or unannounced, the intrusion into a soldier's privacy is identical, and the Fourth Amendment analysis is the same. Moreover, unannounced, though not unexpected,[9] tests are a necessary feature of the Army's drug testing program. The program is aimed at assessing a soldier's readiness to perform the Army's mission. Announced inspections would not give a clear picture of a unit's or soldier's readiness and, therefore, would frustrate the purpose of the program. Cf. *Skinner*, 109 S. Ct. at 1416 (noting that the warrant requirement does not apply in situations where obtaining a warrant frustrates the purpose of the search).

Finally, petitioner's assertion that soldiers are "not given the opportunity to question a positive [urinalysis test] result," Pet. 13, is not true. The implementing regulations specifically allow a soldier

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[9] As the Court of Military Appeals has stated: "The very detailed regulations and policies established by the armed services for drug testing not only provide notice but also reduce the occasion for arbitrariness and abuse of discretion." *Bickel*, 30 M.J. at 285.

to obtain a retest of his sample either at an Army laboratory or "at a forensic laboratory outside the DOD laboratory system at the service member's own expense." AR 600-85 para. 10-8b, at 44. Furthermore, either at an administrative hearing or at a court-martial, a soldier is permitted to call expert witnesses to impugn the test result. Indeed, the Court of Military Appeals has held that in a prosecution for the wrongful use of drugs based on the results of a urinalysis test result, the government must present expert testimony to explain the laboratory test results. *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States* v. *Harper*, 22 M.J. 157 (C.M.A. 1986).

In sum, the Army drug testing program is reasonable. The program advances government interests of the highest order under circumstances where the intrusion on individual expectations of privacy is minimal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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